Editor's note: Reconsideration denied by order dated Aug. 8, 1978

BERT N. SMITH
PAUL W. SMITH
v.
BUREAU OF LAND MANAGEMENT ET AL. 1/

IBLA 77-225 Decided June 30, 1978

Appeal from decision of Administrative Law Judge Michael L. Morehouse affirming the decision of the Elko, Nevada, District Manager, Bureau of Land Management, consolidating the fence maintenance responsibilities of various grazing permittees. Nevada 1-75-2.

Affirmed.

1. Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Appeals

   A decision of a District Manager to consolidate and assign fence maintenance responsibilities to various grazing permittees will be upheld on appeal where a permittee attacking such decision fails to establish that the assignment was arbitrary and capricious.

APPEARANCES: Paul W. Smith, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GOSS

On August 26, 1975, the Elko, Nevada, District Manager, Bureau of Land Management (BLM), issued a decision pursuant to 43 CFR 4115.2-1(e)(14) consolidating and assigning fence maintenance responsibilities to various grazing permittees in the Central and South Ruby Grazing Units, Elko Grazing District. Bert N. Smith and Paul W. Smith appealed the decision pursuant to 43 CFR 4115.2-3 to an Administrative Law Judge, alleging the assignment was discriminatory and unfair in its effect on them.

1/ At the July 29, 1976, hearing the following made appearances as intervenors: Charles Evans, Esq., for Circle Bar Ranches; Loyd Sorenson, for Sorenson & Jones; and John Neff, for Neff Ranch Company. The intervenors were all parties to the fence maintenance decision.

The record of the hearing held on July 29, 1976, before Administrative Law Judge Michael L. Morehouse, clarifies the background of the decision of the District Manager. At the hearing Oscar Anderson, BLM Area Manager for the Elko District, explained that prior to 1968 the permittees or their predecessors held group allotments, i.e., their livestock ran in common on a large allotment. Subsequently, the South Ruby Unit and the Central Ruby Grazing Units were established, individual grazing allotments were set up and fence maintenance responsibility decided upon (Tr. 20-21). Anderson testified that in the spring of 1972 he sent a letter to each permittee asking whether they would agree to consolidation of fence maintenance responsibilities. Consolidation was considered because as it stood the permittees were required to maintain fence in different areas "all over their allotment or somebody else's allotment" (Tr. 22). In addition, the areas to maintain "were actually indefinable on the ground because they would start in the middle of a section and end in the middle of a section" (Tr. 22).

All the permittees agreed to the consolidation and by 1972 or the first part of 1973 all the permittees, except the Smiths, had signed a cooperative agreement for fence maintenance (Tr. 33). It was Mr. Anderson's impression that the Smiths objected to signing the agreement because they felt they were being assigned too great a portion of fence to maintain and because they believed that the fence they were assigned was more difficult to maintain (Tr. 35).

From 1973 to 1975 there was no resolution of the Smiths' objections. In August 1975 the District Manager issued his decision.

At the July 29, 1976, hearing before the Administrative Law Judge, it was determined that the parties could possibly arrive at a settlement, and, therefore, on motion of the Government's attorney, an order was entered to hold the record open to allow the parties to reach an agreement. The District Manager, by letter dated August 23, 1976, advised the Judge that a meeting had been held on August 23 with the Smiths present and that an agreement had been reached. He stated, however, two other permittees had been absent and he requested that the record be kept open for another 30 days to allow those permittees to be contacted. The Judge granted the request.

The fence maintenance agreement which the Smiths had agreed to at the August 23, 1976, meeting was forwarded to Bert N. Smith by the Area Manager. The agreement included a map showing somewhat revised fence maintenance responsibilities. This agreement and map is the subject of this appeal. Bert N. Smith returned the agreement after having signed it; however, above the signature the words were written, "Subject to pending ownership legislation and 20 year life of the fence." "Pending ownership legislation" was an apparent reference to legislation regarding transfer of public lands to state

control. Such a stipulation was of no concern to BLM as the regulations cover change in ownership and administration. On the other hand, BLM did object to the "20 year life of the fence" stipulation.

The Smiths were informed of BLM's objection and it was noted that the other parties to the agreement had signed for an indefinite period of life for the fences. The Judge allowed a second extension up to and including November 19, 1976, in order to allow the parties to resolve the difference. No agreement was forthcoming and on February 10, 1977, the Judge issued his decision. Therein, he stated:

> I specifically find that the decision of August 26, 1975, is not unfair, does not discriminate against appellants, has a rational basis and must therefore stand.
>
> With respect to the agreement signed by Bert N. Smith on September 22, 1976, subject to "20 year life of the fence," I find the action of the district manager in rejecting said stipulation also is supported by a rational basis and not arbitrary and capricious. The evidence at the hearing established that a properly maintained fence has no specifically determinative age and, therefore, the rejection of the twenty year requirement was reasonable. To the extent that various agreements have been signed by the permittees subsequent to the hearing on July 29, 1976, they are hereby incorporated into the decision of August 26, 1975, and all permittees affected thereby are ordered to comply with said decision.

Appellants argue on appeal to this Board that a range fence has only a limited life span. The duration of the fence is affected by several factors including quality of materials used in construction and degree of usage of fenced areas by livestock. It is alleged by appellants that the cost of inspection and maintenance of the fence over 20 years will exceed the original cost of the fence and "should create ownership in the fence." Appellants take issue with the statement in the decision of the Administrative Law Judge that BLM "contend[s] that fences properly maintained with some periodic replacement of spent materials will last up to 75 years or more * * *."

Appellants assert they have been assigned more than their share of fences on the range to maintain. It is contended by appellants that the fences assigned to them are located in the heaviest areas of livestock usage, constructed of inferior materials, and constructed in an inferior manner. Consequently, they require more maintenance. Further, appellants assert their fences are the oldest on this range.

Appellants further argue that the decision of the District Manager assigned them more fence to maintain than they originally "signed up to maintain," apparently referring to the cooperative agreements entered into when the fences were first built. This appeal, however, concerns the 1976 revised plan regarding fence maintenance responsibilities which was the subject of the 1976 meeting of the permittees (including appellants) and BLM. That plan was incorporated by reference in the decision of the Administrative Law Judge. Appellants concede in their statement of reasons that "a new fence agreement was arrived at at the meeting of the permittees on Aug. 23, 1976." (Emphasis in original.)

The issue raised by this appeal is whether the decision of the District Manager regarding fence maintenance responsibilities, as modified by the decision of the Administrative Law Judge on appeal to include the 1976 revised plan, was arbitrary and capricious.

[1] The regulations, 43 CFR 4115.2-1(e)(14), provide that:

> Where Federal range is allotted for the exclusive grazing use of one or more users, the District Manager, if the proper use or orderly administration of the range makes it necessary:
>
> > (i) May require the licensee(s) or permittee(s), as a condition to the granting and continued effectiveness of grazing licenses or permits, to fence or to contribute an equitable share to the cost of fencing the allotted areas, and of maintenance of such fences; * * *.

It is clear from the record (Tr. 18-23; 36-38) that proper use and the orderly administration of the range necessitated a fence maintenance agreement and that the assignment of responsibilities was a proper subject for the District Manager's decision.

A District Manager decision involving administrative discretion will not be modified or set aside on appeal if it is reasonable and represents substantial compliance with 43 CFR Part 4110. See 43 CFR 4.478(b). A decision reached in the exercise of administrative discretion may be regarded as arbitrary or capricious only where it is not supportable on any rational basis. United States v. Maher, 5 IBLA 209, 79 I.D. 109 (1972); see Dunlop v. Bachowski, 421 U.S. 560, 573 (1975). The burden is upon appellant to show by substantial evidence that the decision is improper or that he has not been dealt with fairly. John T. Murtha, 19 IBLA 97 (1975); Claudio Ramirez, 14 IBLA 125 (1973).

Appellants have failed to meet their burden of proof. They have presented no testimony other than that of the BLM Area Manager. 2/ Appellants have presented no offer of proof regarding the fence responsibilities newly included in the 1976 agreement and map. There is no showing that the 1976 responsibilities are more onerous than those in the 1975 decision. Indeed, appellants' willingness to accept the 1976 agreement subject only to the provisions discussed hereafter is a clear indication of the reasonableness of the 1976 plan. Respondent's testimony at the hearing established that the fences assigned to appellants after consolidation were in "fair and good condition" (Tr. 43). It was the opinion of Mr. Anderson that there is no "significant difference" in the difficulty of maintaining the fences assigned after consolidation as compared with those assigned prior thereto (Tr. 46). Neither has appellant shown that he bears an undue responsibility due to the heavy use of his assigned fence maintenance areas. The District Manager's decision and the 1976 plan have a rational basis and the Administrative Law Judge's ruling upholding the revised plan was proper.

We also affirm the Judge's finding that the District Manager's rejection of the "20 year life of the fence" stipulation was supported by a rational basis and was not arbitrary and capricious. At the hearing Mr. Anderson testified that maintenance of a range fence is a continuous process and that if the fence is maintained yearly, "within probably 25 years or so there's a good chance that all of the material has been replaced with probably the exception of the wire in 20 or 25 years" (Tr. 63). He further testified that the oldest of the fences involved was built in 1968 and that a range fence properly maintained will ordinarily "last many, many years" (Tr. 44). It is apparent that proper maintenance belies the ability to establish a specific life span for a range fence. BLM's objection to Bert N. Smith's "20 year life of the fence" stipulation was neither arbitrary nor capricious.

With respect to the allegation regarding ownership of the fence raised by appellants in this appeal, Mr. Anderson testified at the hearing that: "The ownership of a project installed under a Cooperative Agreement rests with the BLM or with the government" (Tr. 106).

2/ Exhibits G-1 and G-2, identified by the BLM Area Manager, are not physically included in the record before the Board. Exhibit G-1 is duplicated by Exhibit G-5. Exhibit G-2 consists of photographs of portions of the fence adjacent to appellants' allotment. No objection having been received, said exhibits are stricken from the record. At appellants' suggestion, all testimony specifically referring to Exhibit G-2 is also ordered stricken, the Area Manager having given ample other testimony concerning his knowledge of the condition of the fences based upon personal observation.

This is confirmed by paragraph 5 of the Cooperative Agreements under which these fences were constructed. Form 7220-2 (October 1965) and Form 7330-7 (December 1968). It was reasonable for the District Manager to reject appellants' position that the fence should become property of appellants.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge